

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 7

AMERICAN STEEL CONSTRUCTION, INC.

Employer,

and

Case 07-RC-269162

LOCAL 25, INTERNATIONAL ASSOCIATION
OF BRIDGE, STRUCTURAL, ORNAMENTAL
AND REINFORCING IRON WORKERS
(IRON WORKERS), AFL-CIO

**UNION'S REQUEST FOR REVIEW OF
REGIONAL DIRECTOR'S DECISION
DISMISSING PETITION**

Petitioner,

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I. PROCEDURAL HISTORY

The Union's petitioned-for unit includes all full time and regular part time journeymen and apprentice field ironworkers from its Livonia, MI facility and specifically excludes all other American Steel Construction, Inc. ("Employer" or "ASC") employees. Bd. Ex. 1(a).

Employer's Statement of position argues:

Local 25 is seeking to create a micro unit of field works [sic] although they share a community of interest with drivers and shop workers contrary to the Board's decisions in PCC Structurals, Inc., 365 NLRB 160 (2017) and The Boeing Company, 368 NLRB 67 (2019).

Bd. Ex. 3.

Further, Employer contends the petitioned-for unit must be supplemented by adding all:

Livonia based field and shop workers and drivers.

Id.

A Representation Hearing was held on December 10, 2020 in Detroit, MI via ZOOM. The hearing was conducted on the record and Parties were permitted to submit post-hearing briefs.

The Regional Director's Decision ("Decision") found that internally the petitioned-for unit "share[d] a community of interest" though "differences from the [excluded] employees who generally work in the [fabrication] shop are not sufficiently distinct so as to warrant a separate bargaining unit." Decision at 6 (*citing* Wheeling Island Gaming, 355 NLRB 637, 641-42 (2010)). The Regional Director also concluded the petitioned-for unit does not constitute a craft unit under Burns & Roe Services Corporation, 313 NLRB 1307, 1308 (1994). Id. This request for review follows.

II. SUMMARY OF THE ARGUMENT

The issue presented is whether the petitioned-for unit of ASC's field installers constitutes an appropriate unit under Section 9(a) of the Act considering whether the proposed unit shares an internal community of interest, whether excluded employees have meaningfully distinct interests that outweigh similarities with petitioned-for employees, and whether the Board has made industry-specific rulings on appropriate units. The Boeing Company, 368 NLRB No. 67 (2019), slip op. at 3. Board precedent does not "disfavor[] the unit configuration sought by a petitioner or described in a representation petition filed with the Board." PCC Structurals, Inc. 365 NLRB No. 160 (2017), slip op. at 10. Thus, Petitioners "unit need only be *an* appropriate unit, and need not be the *most* appropriate unit. The Boeing Company, slip op at 3 (*citing* PCC Structurals, slip op at 12) (emphasis in original).

The Decision appropriately found workers in Petitioner's unit share an internal community of interest. Decision at 6. The Decision made ultimate findings that inappropriately concluded that excluded employees do not share meaningfully distinct interests that outweigh similarities with the petitioned-for unit, inappropriately concluded inapposite Board precedent supports dismissing the petition and failed to consider industry-specific apposite Board precedent which does support the present petition. Thus, the Union requests review as the Decision was clearly erroneous on the evidence regarding substantial factual issues which prejudicially affects the rights of the Union and raises substantial questions of law or policy because of a departure from Board precedent. 29 C.F.R. § 102.67(d)(1)-(2).

Supporting its conclusions, the Decision erroneously concluded ASC employees interchange frequently and are functionally integrated. These findings are erroneous and not supported by the record. Rather, ASC operations are functionally distinct (fabrication, transportation, and installation) with interchange of excluded employees for only unskilled general

labor assistance on a temporary and rare basis. Further, the Decision erroneously disregarded that the petitioned-for unit constitutes a presumptively valid craft unit – outside field installers. Spurred by the erroneous finding of interchange and functional integration the Decision inappropriately dismisses a presumptively valid craft unit.

Likewise, the Decision’s ultimate finding under the second portion of PCC Structurals Inc. is erroneous and departs from recognized Board precedent as the petitioned-for unit’s community of interest is distinct from other communities of ASC employees. Notably, included and excluded employees do not share common supervision, job situs, job duties or functions, have different work weeks and are neither functionally integrated nor share meaningful interchange. Cf. The Boeing Company, 368 NLRB 67, slip op. at 5-6. Thus, excluded employees share a community of interest distinct from similarities with included employees sufficient to constitute separate bargaining units.

On the third portion of the PCC Structurals Inc. analysis, the Decision simply fails to consider patently reasonable industry-specific Board precedents.¹ The Decision relies on precedent either wholly inapposite, neutral, or even supportive of the presently petitioned-for Unit. Apposite Board precedent in this industry-specific setting supports directing the petitioned-for election.

As such, the ASC field installers share a community of interest with each other distinct from any community of interest shared by other ASC workers.

These errors and departures from Board precedent warrant Board review.

¹ Contrary to the Decision, unconsidered Board precedent supports the petitioned-for unit. See, McCann Steel Co., Inc., 179 NLRB 635 (1969); Ingersoll Milling Machine Company, 78 NLRB 535 (1948); York Corporation, 87 NLRB 613 (1949); McCann Steel Company, 94 NLRB No. 65, Case 10-RC-1262; Moynahan Bronze Co., Inc., 112 NLRB 1476, 1477 (1955).

III. SUMMARY OF EVIDENCE

ASC takes orders from customers to fabricate structural iron and steel and install the fabricated products on location. (Tr. 18). The business model requires shop workers to receive and appropriately layout raw beams which are then drilled and welded based on customer specifications. (Tr. 172). Shop workers who read blueprints and layout beams for fabrication are called “fitters.” (Tr. 20). Fitters are also proficient in shop welding techniques performed on metal inert gas (MIG) welders. (Tr. 20; 140-141). Shop workers that primarily weld the laid-out beams according to customer specifications on MIG welders are called “welders.” MIG welders are engaged by a trigger on a gun and the machine lays down a welding bead. (Tr. 141). The fabrication shop also employs painters and cleanup workers who do not perform the functions of a fitter or welder. (Tr. 35). Workers in the fabrication shop are immediately supervised by a Section 2(11) shop foreman. (Tr. 10; 100-101; 162).

Fabrication is done at the ASC shop in Livonia, MI where fitters, welders, and painters report at 6:00 a.m. and typically work an eight-hour day ending at 2:30 p.m. (Tr. 75). Shop work is typically performed five days a week. (Tr. 71). Shop workers take a morning break from 9:30 a.m. to 9:45 a.m. and a lunch break from 11:25 a.m. to 12:00 p.m. (Tr. 76). ASC’s Livonia, MI shop has a break room with tables, coffee pot, microwave, and a refrigerator for its shop employees. (Tr. 93). Monday mornings all employees jointly attend a weekly safety meeting. (Tr. 202).

ASC employees are typically hired and begin working in the fabrication shop and learning its functions before the employer considers sending an employee into the field. (Tr. 149). Employees that show aptitude are trained in additional aspects of the ASC operations, but Employer strongly prefers employees work in the shop first to “test their abilities” and because the fabrication shop is “a safer environment to do that in the job than in the field.” (Tr. 79). ASC administers tests for new hires especially if hiring for a welder. (Tr. 23).

Fabricated items leaving the shop are loaded and trucked to jobsites where field installers unload and sort to prepare for installation. (Tr. 81; 185). ASC employs approximately four CDL drivers to transport these loads. (Tr. 103). After unloading drivers return to the shop. (Tr. 185). Drivers could make between zero and five daily trips and have discretion when to take their breaks while on the road. (Tr. 85-86).

Field erection crews work alongside other tradesmen on jobsites and install fabricated products. (Tr. 124). ASC field installers are led by a “team leader” synonymous with “job leader” or “foreman.” Decision at FN. 2. The team leader directs other field installers while on a jobsite and specifically assigns the other crew members jobs to perform while on site. (Tr. 50). Sean Asbel, a supervisor within the meaning of Section 2(11) of the Act, conducts immediate supervision over shop but not field workers who have no Section 2(11) supervisor on jobsites. (Tr. 10; 101).

Superintendent Gordon assigns field installers to their crews and designates who will serve as the foreman on the job by writing names on a white board in the Livonia shop or texting the details to the various field installers. (Tr. 146; 192). The assigned crew typically remains on a job until its completion. (Tr. 104). ASC employees assigned to work on a field installation crew are consistent, though the individuals on a given crew change from job to job. (Tr. 151).

For instance, the Union presented testimony from field installer Christopher Ecker, a fifteen-year employee. Mr. Ecker spends the vast majority of his time on field installation projects and has not worked for more than a month straight in the shop for over ten years. (Tr. 123; 129). Similarly, field installer Derrick Donaldson, also a fifteen-year employee, testified he spends approximately eighty percent of his time working in the field. (Tr. 157; 164). Testimony indicated

other petitioned-for field installers similarly spend the vast majority of their time in the field. (Tr. 173; 174; 175-176; 178).

Field installation workers also report to the Livonia, MI shop at 6:00 a.m. find out who they are working with, gather materials, and head to the job site in their ASC service trucks equipped with welders and other tools. (Tr. 152; 183). Interaction at the shop between field installers and other shop employees is basically limited to “chit-chat” but there is no required interaction. (Id.).

The field installers depart the shop for their worksite and begin work between 6:30 a.m. and 7:00 a.m. (Tr. 77). On jobsites field installers take their breaks either in the buildings they are erecting, a temporary storage container if one is delivered, or in their vehicles. (Tr. 94). The break times are determined by the team leader typically taken when other trades on the job take their breaks. (Tr. 95). Field installers typically work six days a week but could work all seven days in a week if needed. (Tr. 71).

The Regional Director noted shop employees and field installers might spend as much as thirty percent of their time working in the shop or working in the field respectively. Decision at 2. However, the record shows interchange between fabrication shop workers and field installers is rare. Any temporary transfers only perform general laborer functions and none of the higher ordered skills valued for field installers such as stick or arc welding. (Tr. 128-129).

Specifically, ASC field installers testified that shop workers are assigned to the field infrequently and only “to give a hand for a day or two” but they do not remain on job sites for very long. (Tr. 127). Further, shop employees do not perform field installer duties and functions, rather “they’re just there to grab tools or to give a hand lifting stuff up. Nothing that really involves much skill or anything like. They’re basically just a ground guy.” (Tr. 128). Certainly, shop employees

“wouldn’t be welding.” (Tr. 129). Nor would a field installation team leader “have them up in a lift setting steel or anything like that” “[b]ecause they’re just not trained to do it.” (Tr. 129). Another ASC field installer who is typically designated as a team leader testified that shop employees in the field would only act as a “general labor type guy” for “being an extra hand, helping out” and “grabbing tools” “or carrying something” for the outdoor field installers. (Tr. 181-182). Another cited example involved a fabrication shop worker temporarily helping on a short duration field job to lift jobsite objects for the field installer when returning to work following a shoulder surgery. (Tr. 206).

ASC employs 29 employees and although “employees do not have job titles, at hearing, the testimony **established that employees are assigned to distinct functional roles**, which employees perform for varying percentages of their time. Decision at 2 (emphasis added).

The Regional Director erroneously found the field installers to be highly functionally integrated with excluded employees. (Decision at 6; FN 5). However, ASC employees work on discrete phases of a customer’s order and workers are functionally divided to perform discrete duties and functions which could all be done by separate entities all together.

Comparing policies and procedures of shop fabrication and field installation workers ASC’s Superintendent aptly concludes: “[i]t’s **apples and onions. It’s totally different.**” (Tr. 108) (emphasis added). The Superintendent’s analysis parallels the state of the industry writ large where comparable bargaining units in the same geographic region have separate units for shop fabrication workers and field installers. (Tr. 211-213; 221).

The following specific evidence is likewise important for the Union’s Request for Review:

A. EMPLOYER’S FIELD INSTALLERS HAVE DISCERNABLE SKILLS AND DUTIES SEPARATE AND DISTINCT FROM OTHER ASC EMPLOYEES

Shop fabrication workers work in an enclosed, climate controlled, industrial setting. (Tr. 92). The Livonia fabrication shop is where workers fit, weld, and paint raw steel on a level shop floor which does not even have stairs. (Tr. 91). Fitters read blueprints to layout beams which are sent down the line for welding. (Tr. 20). These jobs are performed with feet on the ground. (Tr. 90-91). Both fabrication shop fitters and welders must be proficient in welding, but they are only ever required to use MIG welders and not arc or stick welders like the field installers. (Tr. 140-141). Shop workers do not interact with customers except on the one occasion in the record where a customer ordered materials for “restaurants” and “high end bars” and wanted to see production. (Tr. 110). Further, shop workers do not interact with other trades. (Tr. 109-110).

Field installers often work from heights which does not happen in the fabrication shop. (Tr. 91). Field installers must know how to and be comfortable with walking and working on suspended steel. (Tr. 138).

Field installers are proficient in reading and executing field erection drawings whereas shop fabrication workers have no reason to look at or read erection drawings. (Tr. 77-78). Field installers must be proficient in reading prints, laying out a job, and especially proficient in welding. (Tr. 183). Importantly, the type of welding – stick or arc welding – performed in the field is different and more difficult than MIG welding performed in the fabrication shop. Id. An ASC field installer described field welding as “us[ing] a rod you stick it in a holder, and you have to push that rod in ever so slightly to get the arc going and to connect the pieces” which is “more of an art form to be an arc welder.” (Tr. 141). Shop workers use MIG welders where there’s a wire that runs through the welding gun operated with gas, field installers must be proficient in stick welding because “with the wind blowing, [field installers] can’t use gas.” (Tr. 166). One ASC field installer succinctly described: shop workers “don’t know how to weld.” (Tr. 183).

Further, field welding is done “out of position” as field installers weld from lifts, ladders, boom lifts, scaffolding and even on the ground, plainly “[i]t’s very hard to weld where [field installers] weld.” (Tr. 141; 167). Fabricating items in the shop, workers manufacture the best possible position to weld items which is not possible in the field. (Tr. 141). Instead, field installers must be able to problem solve on the jobsite. (Tr. 187-188).

The unique nature of field installation work is underscored by the specific federal OSHA regulations governing steel erection which only applies in the field. Decision at 3; See also, 29 C.F.R. §§ 1926.750 – 1926.761.

Moreover, field installers interact with customers, general contractors, and other trades constantly. (Tr. 80; 110). These interactions are essential to completing the installation and maintaining a safe workspace. (Tr. 80). They are also skills and duties not required of shop workers “because they’re in the shop and [ASC doesn’t] allow people to wander into the shop.” (Tr. 109-110). “Field guys have a different amount of interaction with all the other trades ... [a]nd other trades if they’re going to move through an area, they may interact with your guys to tell you what they’re going to do so your guys, or the opposite, can move out of the way people aren’t in harms way and getting injured and stuff like that.” (Tr. 110).

B. ASC’S EMPLOYEE HANDBOOK APPLIES TO ALL EMPLOYEES BUT ASC ADMITS COMPARING PETITIONED-FOR EMPLOYEES AND FABRICATION EMPLOYEES IS AS INAPPROPRIATE AS COMPARING APPLES AND ONIONS

The ASC employee handbook applies to all employees which outlines benefits and other terms that are consistent with all employees. (Tr. 113). The handbook does not establish, and no testimony reveals, ASC administering a uniform pay scale. (Tr. 87). The Regional Director observed workers are paid between \$15 and \$35 per hour based on skill with all employees subject to the same employee handbook and work rules, including those for attendance. Decision at 4.

Presented evidence makes clear the ASC pay range varies with an employee's skill. (Tr. 87-89). A shop worker with the skills to perform fitting work are paid a higher wage than shop workers who cannot perform fitting work. Id. Similarly, field installers who work as a designated team leader are paid a premium for their skill set. (Tr. 87-88).

The Regional Director concluded petitioned-for and excluded employees had "the same wages and benefits" (Decision at 6). This is not so – the evidence showed a range of pay based on skill though no specific amounts paid to each ASC employee. Employer starts all or nearly all new hires in the shop and eventually may move them out to the field when they become more skilled. (Tr. 24). Thus, field installers generally make more money than shop fabrication workers.

Further, evidence at the hearing showed industry practice is to pay field installers higher wages than their shop fabrication counterparts which is a critical separation in the organized setting. (Tr. 216). Most pointedly, ASC's Superintendent cautions against drawing comparison between shop fabrication and field installers as their policies and procedures are "apples and onions. It's totally different." (Tr. 110).

C. ASC'S OPERATIONS ARE FUNCTIONALLY DISTINCT – NOT INTEGRATED

The record shows ASC's business operates in fundamentally discrete phases: fabrication, transportation, installation. (Tr. 19). For instance, no evidence presented suggests that shop fabrication workers fit and fabricate products and then accompany those same products to a job site to install them for a customer. Nor are ASC employees regularly crossing over to perform several discrete phases of the business. The record reflects the opposite. Fabrication workers remain in the shop to fit, weld, paint and perform general shop maintenance while field installers are consistently assigned to a functionally discrete portion of the business – installing fabricated items in the field. (Tr. 126-127; 130).

**D. SHOP EMPLOYEES INTERCHANGE WITH FIELD INSTALLERS
INFREQUENTLY ONLY TO PROVIDE “FILL-IN” GENERAL LABORER
ASSISTANCE – WHEN NECESSARY**

Evidence shows shop employees stay in the shop and once in a great while are asked to help out on outside jobs “to give a hand for a day or two” but they do not remain on job sites for very long. (Tr. 127). When shop employees are temporarily asked to assist on outside jobs “they’re just there to grab tools or to give a hand lifting stuff up. Nothing that really involves much skill or anything like. They’re basically just a ground guy.” (Tr. 128). Certainly they “wouldn’t be welding.” (Tr. 129). An ASC field installation team leader stated: “I wouldn’t have [fabrication shop workers] up in a lift setting steel or anything like that” “[b]ecause they’re just not trained to do it.” (Tr. 129).

Further, evidence in the records shows field installers are in shop when there is not enough field work to keep them busy or if there is inclement weather. (Tr. 130; 175; 176; 178). When field installers are assigned to the fabrication shop, they either work on their service trucks, or may fit and weld until the weather improves. (Tr. 129; 188).

**E. THE CASE PRESENTS NO BARGAINING HISTORY THROUGH INDUSTRY
PRACTICE REVEALS FIELD INSTALLERS CONSTITUTE AN
APPROPRIATE UNIT – AS PETITIONED-FOR**

There is no collective bargaining agreement or bargaining history between the Union and Employer. Decision at 4. The Union presented industrial practice evidence. Ironworkers, Local 25 President Dennis Aguirre testified that steel erectors and shop fabrication workers in ASC’s region are typically covered by separate collective bargaining agreements. (Tr. 209; 211). Mr. Aguirre’s observations of industry practices started in 1998 and he has spent four years as an apprentice, twelve years as a journeymen, three years as a Union trustee, five years as an executive board member, six years as a business agent, and four years as the local president. (Tr. 209-210).

Specifically, Mr. Aguirre testified that 35 steel erection companies who also have fabrication shops are signatory with the Union though the fabrication shops are either not covered by the Union’s collective bargaining agreement or are covered by a collective bargaining agreement separate from those covering the field erectors. (Tr. 211-213; 221).

The Regional Director dismissed the presented evidence of industrial practice suggesting Mr. Aguirre’s testimony “**appear[ed]** to be bargaining units where employers have recognized Petitioner as the Section 8(f) representative of their employees.” Decision at 7 (emphasis added). The Regional Director continued that since Petitioner seeks a 9(a) election other inapposite authority prevents recognizing the petitioned-for unit as appropriate. *Id.*

Mr. Aguirre’s testimony did not mention 8(f) or 9(a) status of appropriate units, but only commented on his observation that field installers are commonly organized as their own appropriate bargaining unit separate from employees who predominately work at an employer’s fabrication shop.

IV. ARGUMENT

A. THE REGIONAL DIRECTOR’S DECISION AND ORDER WAS CLEARLY ERRONEOUS ON SUBSTANTIAL FACTUAL ISSUES AND SUCH ISSUES PREJUDICIALLY AFFECT THE RIGHTS OF THE UNION

1. The Decision Erroneously Concluded That Excluded and Petitioned-for Employees Interchange Frequently and Are Functionally Integrated Preventing Finding a Sufficiently Distinct Community of Interest for Petitioned-for Employees

The Regional Director found “the level of employee interchange and functional integration [] dwarfs” other differences between petitioned-for and excluded employees. Decision at 6 (citing United Rentals, Inc., 341 NLRB 540, 541 (2004)). The Regional Director’s finding is clearly erroneous.

United Rentals included seven employees at an equipment rental business consisting of mechanics, yard employees, and drivers and excluded counter employees, a parts associate, and a branch associate. 341 NLRB at 540. The Board found that despite functionally distinct job roles “employees regularly overlap and interchange duties” because the employer “relies on everyone to pitch in in to do various types of jobs, **despite their designated classification.**” Id. (internal quotations omitted). Accordingly, employees “**perform the duties of different classifications everyday.**” Id. (emphasis added).

For example, the United Rentals Board noted counter employees provide customer service, “they also use the Employer’s pick-up trucks to make equipment delivers, a function usually performed by the drivers” and “virtually everyday [] help customers load rental equipment or assist truckdrivers load their deliveries, a function ordinarily performed by the yard employees.” Id. Similarly, another customer service employee “repaired a number of pieces of equipment that normally would be repaired by the mechanics” and the parts associate “delivers equipment and performs yard duties, at times spending the entire day working in the yard.” Id. Counter employees fill in for yard employees that call in sick and yard employees perform counter duties when they call in sick. Id. A single branch manager oversaw labor relations for all employees. Id. The United Rentals Board reversed its Regional Director’s finding of an appropriate unit noting the constant and daily interchange of employees performing each other’s functions. Id. at 541-542.

The presently petitioned-for unit is inapposite to the one at issue in United Rentals. Here, the field installers possess skills and perform job functions separate from excluded employees. The interchange at issue in United Rentals was constant and almost daily. Here, evidence shows infrequent interchange limited to performance of unskilled general laborer duties. The field installation crews erect steel structures with erection plans not viewed by shop employees,

alongside other tradesmen subject to specific OSHA regulations inapplicable to the fabrication shop workers, and in the elements away from the climate-controlled fabrication shop floor.

United Rentals neither mandates nor warrants dismissal of the Union's petition. Rather, The Regional Director's findings on employee interchange are clearly erroneous.

Further, the Regional Director found ASC employees "are highly functionally integrated." Decision at 6 (*citing* Transerv Systems, 311 NLRB 766 (1993)). Transerv Systems neither mandates nor warrants dismissal of the Union's petition.

Employer in Transerv Systems was in the package delivery and process servicing business. The company employed bicycle messengers and drivers to make its deliveries. *Id.* Employees reported to the same facility, had similar terms of employment, same breakroom, were held to the same safety standards, though were paid differently under "similar formulas based on speed of services and distance traveled." *Id.* at 766. Importantly, the drivers and bicycle messengers worked together to complete the same basic task of delivering packages and messages on a single given delivery. The Board noted "60-70 percent of the Employer's **deliveries require a combination** of a bicycle messenger and a driver," and gave such examples as when drivers were unable to park and a nearby bicyclist completes the last phase of the delivery. *Id.* (emphasis added). Further, both drivers and bicyclists were eligible to become process servers. *Id.* The Board declined to find separate units for bicycle/driver messengers, because "**all employees at issue perform the same functions**; that most deliveries involve both a messenger and a driver, which evidences a high degree of functional integration among, and frequent contact between, drivers and bicyclists" who also had similar terms of employment, supervision, and transfers. *Id.* (emphasis added).

The record establishes ASC employees perform functionally distinct jobs. This finding is clear from the Regional Director's decision and belies its functional integration determination.

Rather, petitioned-for and excluded employees perform distinct elements of ASC's business (fabricating, transporting, and erecting fabricated products for customers). As phases of operation are distinct ASC shop fitters, welders, and painters do not follow a steel beam to a job site to observe field installation workers place and arc weld fabricated pieces into position. The messengers in Transerv Systems worked together to make a single delivery using vehicles and bicycles. Here, the jobs performed are discrete and could conceivably be performed by distinct entities altogether. In fact, evidence shows that frequently occurs. (Tr. 212) (Local 25 President testified that around half of his steel erection signatories have fabrication shops and half do not).

The Regional Director erroneously concluded the petitioned-for and excluded employees interchange frequently and are so functionally integrated as to preclude an appropriate-unit. In doing so clearly distinguishable cases are held as analogous which inappropriately bends Board law to prohibit self-determination of ASC's outside installers. It therefore raises a substantial issue prejudicial to the Union and the present request should be granted on this basis.

2. The Decision Erroneously Concludes the Petitioned-For Unit Does Not Constitute a Craft Unit

The Regional Director erroneously concluded the petitioned-for unit did not constitute a craft unit. Decision at FN. 5 (noting a lack of bargaining history, official apprenticeship program, functional integration with excluded employees, assignment of work based on need and ability, and common interests such as wages, benefits and cross training).

Craft units are a "homogeneous group of skilled journeymen craftsmen, who, together with helpers or apprentices, are primarily engaged in the performance of tasks which are not performed by other employees and which require the use of substantial craft skills and specialized tools and equipment." Burns and Roe Services Corp., 313 NLRB at 1308 (1994) (*citing* Phoenician Resort Corporation, 308 NLRB 826 (1992)).

The absence of “a formal apprenticeship program” or “extensive on-the-job training does not necessarily negate separate craft status” especially where the petitioned-for craft employees “at the very least have extensive experience and no other class of employees is required to have” such knowledge. *Id.* The Board in Burns and Roe further noted a craft unit can exist even where the employer assembles teams with included and excluded employees and the craft employees primarily perform tasks associated with the craft and excluded employees do not. *Id.* at 1308-1309. Even further, “evidence of crossover work is not sufficient to negate the separate identity of” a petitioned-for craft unit. *Id.* at 1309. Rather, “[i]ntegration of operations requiring some crossover between craft and noncraft employees, or between employees of different crafts is permissible. *Id.* (citing E.I. Dupont & Co., 162 NLRB 413 (1966)).

Where no bargaining history on a more comprehensive basis exists, a craft or traditional departmental group having a separate identity of functions, skills, and supervision, exercising craft skills or having a craft nucleus, is generally appropriate. *See, e.g., E. I. du Pont & Co.*, 162 NLRB 413, 418-419 (1966); *see also, Mirage Casino-Hotel*, 338 NLRB at 532-534; E. I. du Pont (Florence Plant), 192 NLRB 1019 (1971).

In the construction industry, an appropriate unit exists where the petitioned-for employees are a clearly identifiable and homogeneous group with a distinct community of interest. Del-Mont Construction Co., 150 NLRB 85, 87 (1965) (separate units of heavy equipment operators and laborers and truckdrivers appropriate); New Enterprise Stone & Lime Co., 172 NLRB 2157 (1968) (unit of heavy equipment operators, mechanics, and oilers).

As discussed, ASC employees are not functionally integrated, they are functionally distinct. While ASC employees do not graduate from formal apprenticeships, the outside field installers possess highly developed skills unique to the craft for performing field installation work.

The Board standard for finding a craft unit explicitly tolerates some amount of interchange and certainly allows craft workers working alongside non-craft unit members when they predominately perform craft work. Further, ASC assigns work based on skill and need – but the skill factor clearly predominates as temporarily assigned shop workers only perform general laborer functions while in the field. Proper evaluation of the Burns and Roe factors to the facts underlying the instant petition warrants finding the petitioned-for unit is a craft unit and therefor presumptively appropriate under the act.

The Board’s erroneous conclusion on this determination prejudices the Union, raises a substantial issue and the request should be granted on this basis.

B. THE REGIONAL DIRECTOR’S DECISION AND ORDER DEPARTS FROM BOARD PRECEDENT IN ITS ULTIMATE FINDING THAT EMPLOYER’S FIELD INSTALLERS DO NOT SHARE A COMMUNITY OF INTEREST SUFFICIENTLY DISTINCT FROM OTHER EMPLOYEES TO CONSTITUTE AN APPROPRIATE BARGAINING UNIT

The Regional Director found petitioned-for employees appropriately share a community of interest with each other though “their differences from the employees who generally work in the [fabrication] shop are not sufficiently distinct so as to warrant a separate bargaining unit.” Decision at 6 (*citing Wheeling Island Gaming*, 355 NLRB 637, 641-42).

Wheeling Island Gaming involved a petitioned-for group of 40 full-time and 20 part-time poker dealers at Employer’s casino excluding an additional 145 full-time and 35 part time other table game dealers. Id. at 640. There, the Board agreed with directing an election of the larger unit consisting of all table dealers. Id. at 637. The Regional Director noted the “duties and functions of all of the dealers are substantially similar, with individual variations depending on the particular game which they are responsible” nor do any dealers “exercise discretion either in the manner in which the games are played or in the manner by which winnings are determined.” Id. at 640. All

dealers are subject to the same hiring processes, pass a drug test and background check, only deal games they are certified for, work similar hours, and earn wages based on hours and tips. Id. at 640-641.

Importantly, Wheeling Island Gaming petitioned-for and excluded employees could not be distinguished “on the basis of their job functions, duties, or skills.” Id. 641. Instead, “[a]ll dealers perform the same basic function, that is, operating various wagering games for customers.” Id.

The Board recently detailed when excluded employees do not share sufficiently distinct interests from petitioned-for employees to warrant separate units. The Boeing Company, 368 NLRB 67, slip op. at 5-6. There, included and excluded employees were functionally integrated throughout a single industrial process, shared departmental overlap, shared supervision, had similar terms of employment, and excluded employees spent significant time performing job functions of petitioned-for employees. Id. at 5. Petitioned-for employees held particular licenses though their interests, skills and training were not much different than excluded employees, thus, the “interests they share with excluded employees are far more significant than those that differentiate them.” Id. at 5-6.

The presently petitioned-for unit and excluded employees are readily distinguishable from the overlapping job functions, duties, and skills of functionally integrated workers reviewed in Wheeling Island Gaming or The Boeing Company.

Petitioned-for field installers are skilled employees that deliver a highly skilled service to ASC customers. Field installers complete more complicated tasks than shop workers, using different techniques and equipment, in the elements and alongside other tradesmen on the jobsites between six and seven days a week. Field installers take morning and lunch breaks on the jobsite when directed by their team leader, often in conjunction with the other job site trades. Field

installers comply with a unique set of federal regulations. The job of a field installer is more dangerous, and interpersonal than any in the ASC shop. It is also subject to separate supervision. As discussed above, ASC's operations are functionally distinct – not integrated, and interchange from shop workers is limited to temporary general laborer duties on rare occasions and not for performance of field installation craft duties and skills.

Fabrication shop workers fit, weld, paint, and perform general shop maintenance in climate controlled and ostensibly safe conditions. Fitters use blueprints to layout materials but unlike field workers, have no reason to read or follow erection drawings. Shop welders work from comfortable positions with their feet on the ground, take schedule breaks at the same time each day in their shop's breakroom. Fabrication shop workers only work between five and six days a week. Fabrication shop workers are separately supervised. The factory setting is free from other tradesmen and women, inclement weather, and customers. The community of interest of these fabrication shop employees is evident and sufficiently distinct for bargaining purposes to outweigh those shared by field installers.

On these points the citation to and facts present in Wheeling Island Gaming and The Boeing Company are inapposite. Included and excluded workers do not share common supervision, are not functionally integrated, have only rare and unmeaningful interchange, and are clearly separated by their job duties and functions.

The Board should accept ASC's testimony that comparing field installers and shop fabrication workers is like comparing **“apples and onions. It's totally different.”** (Tr. 108) (emphasis added). Thus, the Decision's misapplication of Board precedent raises a substantial question of law or policy warranting Board review.

C. THE REGIONAL DIRECTOR’S DECISION AND ORDER DEPARTS FROM BOARD PRECEDENT BY APPLYING INAPPOSITE BOARD PRECEDENT AND FAILING TO APPLY APPOSITE BOARD PRECEDNET IN FINDING THE PETITIONED-FOR UNIT INAPPROPRIATE

1. The Regional Director’s Cited Precedent is Inapposite and Does Not Warrant the Petition’s Dismissal

The Regional Director received evidence of industry practice supporting appropriate units of field installers separate from shop fabrication workers. Decision at 7. The Director dismissed the evidence presented as “appear[ing] to be bargaining units where employers have recognized Petitioner as the Section 8(f) representative of their employees” whereas the instant case falls under Section 9(a). *Id.* The Regional Director continues that previous Section 9(a) cases have found units of “shop and field workers appropriate where the employer both fabricates and installs structural steel.” *Id.* (citing cases).

Either the Regional Director is granting a “shop” can be construed as a construction unit under Section 8(f) or Section 8(f) is broadened to include non-construction units. No Board, much less the Act’s text supports this position.

The Regional Director’s cited cases are either inapposite or give credence to Petitioner’s position. Notably, none of the Regional Director’s citations direct finding the petitioned-for unit to be inappropriate. Instead, the petition-for unit is an appropriate unit.

The Director cites Detroit Incinerator Co., 45 NLRB 414 (1942). Decision at 7. Detroit Incinerator Co. involved the appropriateness of a unit of five unrepresented employees in a fabrication shop where some workers spent a minimal amount time working in field production. 45 NLRB 414, 416 (noting residual shop workers are subject to field assignment when needed). Workers performing the principal field installations for the employer were already represented under working agreements between the employer and both the Hod Carriers and the Bricklayers

Unions. Id. Thus, the question was whether an appropriate unit existed for the remaining residual employees – shop workers subject to call into the field. The Board concluded “since all production employees save these in the unit proposed by the Iron Workers are presently covered under a working agreement with affiliated labor organizations, employees in the proposed residuary unit must either properly constitute a separate bargaining unit or be indefinitely denied the right of collective bargaining until such time as a labor organization desires to represent them as part of a larger unit. Under these circumstances, we find that the unit proposed by the Iron Workers constitutes an appropriate bargaining unit.” Id. at 417.

Nothing in Detroit Incinerator Co. deters from finding the petitioned-for unit appropriate. The opposite is true. The cited case underscores the industry practice of separate units for workers predominately focused on installation work and for workers predominately focused on shop fabrication work.

The Regional Director also points to Comwel Co., where the Board deemed appropriate a unit of employees who fabricated structural components and equipment and installed such components and equipment used in service stations. 88 NLRB 810 (1950). The petitioned-for unit consisted of both shop fabricators and field installers as “[t]he same employees used by the Employer to manufacture products inside its plant are used to erect and install the prefabricated service stations and related equipment in the field at job locations.” Id. at 812. (emphasis added). An intervening labor organization sought to exclude the outside servicemen though as the employees were constantly interchanging, performing the same work, dealing with the same management, under similar employment conditions the Board concluded the petitioned-for unit constituted a single bargaining unit. Id.

Comwel Co supports the argument that outside servicemen do not per se need to be included in their own unit when they perform the same duties as fabrication workers – there is no room or reason to differentiate. Importantly, the Comwel Co., Petitioner sought the certification of the wall-to-wall unit and there was little in the Employer’s business model to differentiate classification of employees. Neither is true here. Again, field installers are predominately focused on performance of their craft duties – outside field installation. The same analysis that rejects the reasoning in Transerv Systems as inapposite applies here.

The Regional Director further notes Pointer-Willamette Co., where the Boilermakers Union attempted to sever a craft unit, excluding certain production workers in employer’s steel barge construction company, from a **wall-to-wall unit already represented** by another labor organization. 93 NLRB 673 (1951). The Board recognized that petitioned-for severance would create a unit “within the traditional craft of boilermakers, a recognized craft group.” Id. at 674. However, if granted there would be a residual group consisting of one truck driver, one painter, one carpenter, one stockroom man, one draftsman, and one crane operator.” Id. at FN 5. Further, the petitioner had a showing of interest for the wall-to-wall unit and expressed its interest in representing the entire presently recognized unit, thus, the Board deemed “only the over-all production and maintenance unit is appropriate.” Id. at 675. The Pointer-Willamette Co. severance principles are not applicable here as the petitioned-for unit is the first organization campaign at ASC. Further, nothing in Pointer-Willamette Co. suggests that the ASC-proposed wall-to-wall unit is the only appropriate unit. Rather the cited decision is a cautionary footnote regarding severance issues in an already organized wall-to-wall unit, inapposite here.

Finally, the Regional Director cites Plant City Welding & Tank, where the Board deemed appropriate a **petitioned-for unit** consisting of “[a]ll production and maintenance employees,

including truckdrivers and helpers, checkers, and expeditors.” 118 NLRB 280, 283 (1957). There, “[e]mployer [wa]s engaged in the fabrication and sale of steel beams, boxes, cyclones, storage tanks, smoke-stacks, ducts, and the like.” *Id.* at 281. However, the Board’s reasoning for approving the petition was scant. Plainly, the unit approved by the Board **has no mention of outside field installers**. Thus, the Regional Director’s citation to this case adds nothing to the present inquiry but especially does not cut against the Union’s petitioned-for unit.

2. Board Precedent and Record Evidence Support the Petitioned-for Unit of Field Installers

The Board directs Regional Directors to “consider guidelines that the Board has established for specific industries with regard to appropriate unit configurations.” *PCC Structurals, Inc.*, at 11. The Region considered inapposite cases, none of which cut against the Union’s petitioned-for unit. Instead, unreviewed Board precedent and record evidence supports the present unit and a direction for a unit election.

In *McCann Steel Co., Inc.* the Board noted “[f]ield construction and installation employees have been found by the Board to be properly excluded from a broader in-plant unit where the inside and outside workers perform essentially different types of work under separate immediate supervision and interchange is limited.” 179 NLRB 635 (1969). (citing *Ingersoll Milling Machine Company*, 78 NLRB 535 (1948); *York Corporation*, 87 NLRB 613 (1949); *McCann Steel Company*, 94 NLRB No. 65, Case 10-RC-1262); *See also*, *Moynahan Bronze Co., Inc.*, 112 NLRB 1476, 1477 (1955) (the Board deemed appropriate a petitioned-for unit of maintenance and production workers in a Michigan defense subcontractor’s fabrication shop **excluding** “erection, installation and construction employees primarily engaged in the installation of the Employer’s products on customers’ property” even though production and maintenance workers in Employer’s architectural department would on occasion assist in field work “to perform certain specialized

jobs for limited periods of time” and they “spend the vast majority of their time in the plant where they engage in production work; they are separately supervised by a plant foreman; and they are always carried on the architectural department, rather than the field installation payroll.”).

McCann Steel Co., Inc. involved two closely situated steel fabrication plants where production and maintenance workers fabricate steel to specification, which was then trucked to construction sites, and installed by employer’s field erection crew. Id. at 635. Shopmen’s Local Union No. 733 petitioned for a unit consisting of the production and maintenance employees, truckdrivers, and excluding the field installers. Id. Separately, Iron Workers Local Union 492 petitioned for a unit consisting of only the field installers consisting of three ironworkers, three welders, and four helpers. Id.

As ASC complains presently, the employer in McCann Steel Co., Inc. cautioned the petitioned-for units were too restrictive and were prohibited by the Act. Id.

The Board noted the employer’s shop personnel layout steel beams on the shop floor according to blueprints. Id. Shop and field welders were paid the same and ironworkers were paid comparably with the shop layout men (“fitters” in the ASC vernacular), though ironworkers received premium pay for hazardous assignments. Id. Both petitioned-for units were separately supervised except on days when erection crew members were “assigned to work in the plant side by side with production and maintenance employees, or plant employees are sent to assist in the field” which takes place “when some little insignificant job will come up, and when the field employees have extraordinarily heavy workload.” Id. (internal quotations omitted). Similarly, field installers were assigned to work in the shop during periods of inclement weather. Thus, field installers typically spent 80% of their time in the field and 20% in the shop. Id. The Board

dismissed employer's argument that substantial interchange of shop and field workers warranted finding that only a single unit consisting of shop and field employees is appropriate. Id. at 636.

A similar conclusion is warranted with the present petition. Evidence shows field installers spend the vast majority of their time in the field and shop employees spend the vast majority of their time in the shop. Shop employees are called to help field installers when field installers are in the need of temporary general laborer assistance. Similarly, some field installers might spend some of their time in the fabrication shop fitting, welding, or cleaning out their trucks when there is scant erection work or inclement weather. The similarities between the present petition, record evidence and McCann Steel Co., Inc., abound.

Therefore, failing to consider or departing from the officially reported Board precedent raises a substantial question of law or policy and the Board should grant review.

V. CONCLUSION

For the foregoing reasons, the Union respectfully requests the Board grant its Request for Review and issue a Decision and Direction of Election in the Union's petitioned-for unit or remand the proceedings and order Region 7 to issue an appropriate Decision and Direction of Election.

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